Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CAROL BRILEY,

Petitioner,

v.

NATIONAL ARCHIVES & RECORDS ADMINISTRATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are a federal employee's due process and property rights in her job violated when administrative and appeal forums fail to adhere to the rules for resolving factual disputes, and fail to timely resolve the employee's exercise of her rights in these forums?

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OPINIONS BELOW

The opinion below is reported as 236 F.3d 1373 (Fed. Cir. 2001). This was an appeal from the Board's second opinion in this case which can be found at 83 M.S.P.R. 380 (1999) (June 29, 1999). This appeal by Petitioner was from an initial decision of Administrative Judge Puglia issued October 21, 1998 which resulted from a remand by the Board in 71 M.S.P.R. 211 (1996) (July 19, 1996) which had vacated the initial decision rendered by Judge Rima on October 6, 1995 upon appeal by the Agency.

STATEMENT OF JURISDICTION

The Federal Circuit Court of Appeals entered its decision on January 22, 2001. The Chief Justice subsequently extended the time within which to file the instant Petition for a Writ of Certiorari to and including May 22, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This Petition concerns Section 7703(c) of Title 5 which reads:

> (c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be —
>
> > (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence; except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

STATEMENT OF THE FACTS

This matter is before this Court on a claim made by Petitioner under the 1989 Whistleblower Protection Act. Petitioner sent a letter to the Office of Special Counsel (hereinafter referred to as OSC) on September 6, 1994 regarding alleged retaliation for whistleblowing. After the time period had run, Petitioner filed an Individual Right of Action (hereinafter referred to as an IRA) with the St. Louis Regional Office of the Merit Systems Protection Board (hereinafter referred to as the MSPB).

The matter was heard by Administrative Judge William Rima III (hereinafter referred to as AJ Rima) who issued his Initial Decision October 6, 1995 (hereinafter referred to as ID) finding that Petitioner's supervisors had retaliated against her for her whistleblowing and ordering that she be placed in a GS-12 position. The Agency appealed the ID and the Board reversed on jurisdictional grounds. *See* 71 M.S.P.R. 211 (1996). The Board also ordered that if Petitioner was able to show she was entitled to a GS-12 she should be placed

in that position as the Agency's failure to reclassify her position would constitute a "personnel action" for IRA purposes under 5 U.S.C. § 2302(a)(2)(A)(ii).

Upon remand the case was sent to the Central Region of the MSPB in Chicago as the St. Louis Regional office had closed. Petitioner in an effort to cure the defects raised by the Agency in its first appeal to the Board, filed a second complaint to the OSC in 1995, after the 1994 amendments to the Whistleblower Protection Act. When the case was remanded, she sought to proceed under the second OSC complaint by abandoning the claims set forth in her initial OSC complaint. A second Administrative Judge, Puglia (hereinafter referred to as AJ Puglia), heard Petitioner's IRA based upon her amended claims to the OSC filed December 1, 1995.

The matter was heard for a second time in February, March and May of 1997, two years after the initial hearing. AJ Puglia rendered her 158 page ID (hereinafter referred to as ID2) October 21, 1998, 17 months after the second hearing which was almost devoid of legal citation, and which totally failed to identify factual disputes and resolve them under appropriate case law. Although the first ID had resulted in a finding of whistleblowing and retaliation as well as an improper denial to Petitioner of a GS-12, ID2 found that Petitioner had not made most of the protected disclosures she claimed to have made; that alternatively the disclosures were not the type upon which she could make claim; that she had not established that she had been retaliated against for her whistleblowing; that adverse personnel actions had not been taken against her, and even if they had, that the Agency had shown by clear and convincing evidence that it would have taken the same action anyway. Petitioner filed

an appeal which was summarily dismissed by the Board June 29, 1999, with absolutely no discussion of the issues. *See* 83 M.S.P.R. 380.

A notice of appeal was timely filed with the United States Court of Appeals for the Federal Circuit. Oral argument was had in September 2000 after briefing by the parties. A decision was rendered January 22, 2001 in which the Board deferred totally to the factual findings of AJ Puglia despite extensive briefing on the glaring inconsistencies in her findings and AJ Puglia's ignoring basic rules of resolving factual disputes. This total deference to the lower forum's fatally flawed factual findings adversely colored the remaining opinion of the Federal Circuit. Although the Federal Circuit found that the AJ had applied incorrect standards for disallowing most of Petitioner's claimed whistleblowing acts, and had also incorrectly found she had failed to administratively exhaust her remedies, it then relied on the flawed factual findings of the AJ resulting in a denial of Petitioner's claims despite Petitioner's detailed outline to the Federal Circuit, and the Board previously, of the countless factual inconsistencies and flawed analysis. In short, there was no analysis of the arbitrary and capricious manner in which the AJ had treated the factual disputes. The Federal Circuit closed its opinion with a rebuke to the Board for the time it took to process the instant case but made no comment on the impact that this had on the ultimate outcome.

Turning to the underlying facts of the case, Petitioner at the time of both hearings was a GS-11 journeyman archivist at the Truman Presidential Library in Independence, Missouri. She had started at the TL in the early 70's and had not risen above a GS-5 until she received a promotion to a GS-7/9/11 position as a result of an EEO settlement in 1986

with the TL and the then assistant Director, about whom she had complained. In approximately 1989 after numerous security issues with a GS-11 journeyman archivist performing classified work in the TL vault resulted in the "worst security violation in the history of NARA", Petitioner assumed the other archivist's duties for the declassification program. Thereafter, she was responsible for the daily vault operations with minimal supervision by the Supervisory Archivist, her supervisor, who admitted he had no experience of any kind handling classified documents.

Petitioner after being placed in charge of the TL vault made protected disclosures in two areas: first, with regard to the other archivist's continued work in classification; and second, problems with the physical vault holding the classified holdings of the TL. These disclosures were made both within the TL and outside the TL to NARA's Central Office in Washington, D.C. (hereinafter referred to as CO). Petitioner testified a National Security Council directive required she report **possible** security compromises to her supervisor. Petitioner's disclosures included her reporting how the other archivist talked too much about classified materials to the persons not properly cleared; about the violation of personnel standards under DCID by maintenance of his security clearance; that intelligence agencies were complaining they had been told his clearances had been dropped and he was to be fired but apparently the clearances were not dropped and he was still doing classified work; about his removing classified material from the vault to work on it in nonsecured areas in violation of rules prohibiting this conduct; how he misinformed the White House about a document; how he wrote the NSC to ignore rulings by the CIA on documents; how he improperly divulged classified information in card indexes for the public generating FOIA

requests to the CIA; how he improperly shared classified information with uncleared researchers; how he improperly shelved classified materials on "open non-classified" shelves which the FBI complained about; how CIA Intelligence officers complained about his continued access to, and handling of, classified documents; how he improperly opened classified materials in violation of CIA rules; and, how he improperly wrapped and tagged classified documents that were being sent to agencies for declassification. Unrebutted testimony by Petitioner in both hearings was that these were not *de minimus* violations of rules, but substantial violations which remained unresolved for the handling of classified documents and their declassification.

Petitioner also disclosed to her TL supervisor and the Assistant Director at TL and CO her concerns about uncleared guards doing repair work on the vault; issues about the vault doors; the alarm system; the codes being utilized; inadequate locks; lack of motion detectors and magnetic control devices; tour groups going by the open vault when classified documents were in the open; uncleared guards having control of the keypad giving access to the vault, uncleared contractors doing work above and around the vault, — all of which violated requirements imposed by the "intelligence community" for holding the documents at the TL. These complaints were voiced repeatedly from 1990 through the fall of 1993.

TL and CO management confirmed they had knowledge of these disclosures. The TL Assistant Director testified Petitioner had brought to his attention problems with the vault and people having access to it who should not and that Petitioner frequently reported problems with the declassification program regarding items of security with the

vault, vault alarms, through 1993. The TL Assistant Director admitted Petitioner had made disclosures to him about the other archivist. Petitioner's supervisor admitted that Petitioner had brought issues to his attention regarding the vault alarms and that he and Petitioner talked about the other archivist numerous times after 1989.

The Deputy Assistant Archivist for Presidential Libraries was involved in various personnel activities, personnel studies, reviewing personnel actions requests and processing them on through NARA personnel. He testified he was aware Petitioner had made complaints about the alarm vaults in 1993. Finally, the Information Security Manager for NARA testified that in the fall of 1993 Petitioner brought to her attention the continuing vault problems and her concern that TL may loose its certification if the problems were not corrected. The Information Security Manager for NARA testified that when Petitioner would bring these complaints to her attention she would relay them to the Director of the TL, TL Assistant Director and Petitioner's supervisor. The Information Security Manager for NARA contends these individuals would know the complaints came from Petitioner because it was Petitioner who was doing the majority of the work in the vault. The Information Security Manager for NARA testified Petitioner brought her concerns about the other archivist mishandling classified documents and that Petitioner told her she had brought her concerns about the other archivist to her supervisor. The Information Security Manager for NARA testified that The Deputy Assistant Archivist for Presidential Libraries told her that Petitioner had notified PL of "serious security violations."

In light of this evidence, ID2's findings that Petitioner's disclosures were "trivial" is unsupported by substantial

evidence. No one from PL or the TL ever disputed at any hearing that the intelligence community was complaining about multiple security issues at TL. The Information Security Manager for NARA testified that TL held very high level national security documents. No one ever told Petitioner she was making "a mountain out of a molehill" in regard to reporting these violations. Petitioner also testified that when she brought issues to her supervisor and the Assistant Director's attention they did not tell her she was overreacting, but confirmed to her they knew there were problems. Petitioner was told by the CIA that the problems involving the other archivist were serious: they complained about pages being missing from work done by the other archivist. The CIA also asked Petitioner to identify the other archivist when a CIA team came to look at documents. The CIA asked Petitioner at that time why the other archivist had not been fired for his violations.

The Information Security Manager for NARA testified that "intelligence agencies were very serious in their request to have the other archivist not handle classified documents." She went on to testify that Petitioner could not ignore vault problems and could not "pick and choose" which regulations to follow. According to the Information Security Manager for NARA, Petitioner made reports of purported security violations as she was required to do and used good judgment in doing so. Additionally, although ID2 infers that somehow Petitioner had discretion in reporting violations and abused that discretion, the rules regarding security were not discretionary with the TL according to the Information Security Manager for NARA which testimony was unrebutted by anyone else in the Agency. Finally, during the 1995 hearing of this matter, nearly one year after Petitioner's removal from her duties in the vault, the vault

was inspected by the Information Security Manager for NARA. TL was told if they did not correct some of the items Petitioner had been raising, TL would loose its vault certification. If the vault certification was lost, TL could not hold classified documents and they would be removed from TL. Despite this undisputed evidence ID2 found that only two of Petitioner's disclosures in 1990 were "reasonable" is unsupported by substantial evidence. This alone should have alerted the Board and the Federal Circuit to the arbitrary and capricious nature of the second AJ's rulings

The remainder of the Federal Circuit's opinion relies on factual findings by the AJ in ID2 that not only contradicted the factual findings in the original ID but which were fatally flawed by failing to resolve factual discrepancies as required by the Federal Circuit in Administrative forums for federal employees. This disregard for resolving the factual discrepancies and the ultimate decision between ID and ID2 resulted in a denial of due process for Petitioner and her property interest in her employment with the government. Despite findings by the AJ and the Federal Circuit that there was substantial evidence to support the ultimate findings of ID2, the fact of the matter is that the entire analysis of this portion of the case ignored the glaring factual disputes that the AJ consistently resolved in the Agency's favor even where no evidence for a factual conclusion or all the evidence pointed in Petitioner's favor.

Two key issues were the removal of Petitioner's duties and what she did thereafter; and her ability to obtain a GS-12 for the work she had been doing prior to March 1994. The Deputy Assistant Archivist for Presidential Libraries testified the 1990 Core Staffing Study done by CO provided for a nonsupervisory GS-12 **at the TL** as a "bridge" position

between a GS-11 Journeyman archivist and GS-13 Supervisory Archivist position, the purpose being to provide training for GS-11's on their way to supervisory positions so they would be ready when the GS-13 supervisory position became available. According to the Deputy Assistant Archivist for Presidential Libraries the difference between a GS-11 and a GS-12 non supervisory archivist was "depth of knowledge of the subject matter and senior experience". The Deputy Assistant Archivist for Presidential Libraries discussed with Petitioner's supervisor and the TL Assistant Director Petitioner's 12 request sometime in December of 1993. He told them "he had no problem with Petitioner being given the 12". The Assistant Director testified that when he talked with The Deputy Assistant Archivist for Presidential Libraries after his initial conversation with Petitioner, he mentioned to him removing some of her duties; the Deputy Assistant Archivist for Presidential Libraries response was allegedly that it might be considered "reprisal" for coming to him for the GS-12. The Deputy Assistant Archivist for Presidential Libraries admits there was a discussion of "reprisal" in his conversation with Assistant Director in December, but does not recall what the discussion was in reference to at that point in time or even who brought it up.

A PL classification specialist, confirmed the distinction between a GS-11 Journeyman archivist and a GS-12 non-supervisory archivist and stated the position was established "to assist the archivist-in-chief in running the staff and to establish career opportunity". The position description was generalized to allow for flexibility in the position. The PL classification specialist, **like the Deputy Assistant Archivist for Presidential Libraries, testified that what sustained a GS-12 non supervisory position was senior level archivist knowledge and work**. The PL Classification

Specialist stated after the Core Staffing Report was issued "most if not all" of the PLs opted to get a GS-12 approved. Other factors considered for a GS-12 would be whether Petitioner worked independent of her supervisor or if the declassification work was going to increase as her supervisor believed, and informed the Deputy Assistant Archivist for Presidential Libraries, after the Executive Order on declassification was signed by President Clinton. **None of this was provided the PL Classification Specialist although he suggested it be provided him so that he could evaluate Petitioner's job.** The Assistant Director admitted the PL Classification Specialist asked him whether he wanted a desk audit on Petitioner but that TL did not follow up on the request.

Petitioner was extremely knowledgeable in her field. According to Petitioner's supervisor, prior to March of 1994 he had never handled the documents in the vault; nor had he done mandatory review work and only knew what Petitioner told him. The other archivist stated only Petitioner had the expertise to do declassification work as of March of 1994, and that others, including himself, would need additional training. The Assistant Director testified Petitioner was the only "certified archivist" at TL, and that Petitioner had done the best job of anyone in the job of declassification at TL.

Although ID2 found a GS-12 was not available at TL, this was clearly not the case given the above testimony. Although the Agency contends Petitioner was not doing the work of GS-12, questionnaires were submitted to the personnel at other PLs who Petitioner contended were doing her job and who had GS-12s or higher graded positions. The questions submitted to these individuals by Petitioner asked whether the duties which Petitioner contended she was

performing at the time the Agency removed her from her job duties in March of 1994 as stipulated to by the Agency during the first hearing, were being performed at the GS-12 or higher grades in other PI's. The responses demonstrate Petitioner had as many —if not more — duties than most of her counterparts at other libraries prior to the removal of these duties in March of 1994 and that the duties she was performing in March of 1994 were those that her counterparts were performing as a GS-12 **or higher grade level.** Petitioner testified that after she took over the declassification program from the other archivist in 1989 she had no daily or weekly supervision from her supervisor; no one reviewed her work and no one passed judgment on her decisions; she prepared the reports and when necessary had her supervisor sign. Her supervisor never changed anything on the reports. Petitioner wrote the first declassification manual for the TL. However, the Federal Circuit felt this evidence was not relevant and only supported that all the GS-12's should be reclassified as 11's. Clearly this did not happen.

The AJ and the Federal Circuit also found that Petitioner did duties consistent with her position of a GS-11 after the removal of her duties. However, this is not borne out by substantial evidence in the record. First of all, AJ Rima had found that Petitioner's job duties had in fact been taken away as stipulated to by the Agency. He found Petitioner had been relegated to low level duties. AJ Puglia disagreed finding there was no stipulation. However, AJ Puglia never sought to explain why her decision was diametrically opposed to that of AJ Rima. Petitioner testified that on March 28, 1994 her supervisor called her to his office and informed her she would no longer be doing declassification work and there would be no promotion. When Petitioner asked what she would be doing he stated "he didn't know, because he hadn't

thought about it." Petitioner testified that after she was removed from her duties she called a friend at CO. According to this friend, the TL Assistant Director had not asked for a GS-12 for Petitioner but had called CO and referred to her as a "troublemaker" and that he wanted to get her out of the vault and rid of her. This friend also told Petitioner that the Deputy Assistant Archivist for Presidential Libraries came to her and said "you're a friend of Petitioner, but you should know she is a troublemaker." These statements were unrebutted by the Agency at hearing yet AJ Puglia found that Petitioner did retain duties consistent with her Grade level and was not the subject of retaliation. For example, AJ Puglia found she retained declassification duties but Petitioner testified that she was never allowed to do that work. These factual discrepancies are glaring throughout this analysis of Petitioner's work post March 1994 yet the AJ and the Federal Circuit ignored the evidence.

After Petitioner's removal from her duties, she had nothing to do and was sitting around at different desks in the building reading books. According to Petitioner, her supervisor told her he would send her yellow slips with work on it. In May or June 1994 her supervisor announced that a GS-5 secretary at the TL had retired and he gave Petitioner some of her duties including typing labels, putting documents in folders, writing cross indexes. This was not denied by the Agency at any time. After March 1994 Petitioner's job duties were not described to her. Petitioner testified that prior to March of 1994 she was answering letters on foreign policy matters but that after March of 1994 she would be answering letters from children requesting pictures of Truman or for information on class history papers, tasks the GS-5 had been doing. She had about an hour of work a month to fill her time. None of this testimony is rebutted by the Agency.

ID2 states Petitioner's duties were not taken away or were in fact shared duties, despite a stipulation signed by the Agency detailing the taking away of Petitioner's duties, and a "restructuring memo dated March 24, 1994. AJ Rima who participated in the drafting of that stipulation found that the Agency stipulated to the taking away of the duties. The stipulation admitted Petitioner performed in excess of 100 discreet tasks independently without direct supervision as part of her job prior to March 24, 1994 and that after March 24, 1994 she was not only removed from those duties, but relegated to clerical tasks of a GS-5 which were discreetly assigned by her supervisor. Again, unrebutted by the Agency. **Petitioner contends that after March 24, 1994 she performed jobs at an Archival Technician level or below, and did nothing at the level she had been doing prior to March 24, 1994.** Petitioner's title of Alternate Top Secret Control Officer and Alternative Assistant Information Security Officer was removed in March of 1994. That Petitioner's duties were removed is further substantiated by the Agency's refusal to reinstate them in August of 1994 after a grievance was filed by Petitioner.

However, the most fatally flawed analysis by AJ Puglia, which was affirmed by the Federal Circuit, was the review of the "clear and convincing evidence" that AJ Puglia claimed supported that TL would have removed Petitioner from her job and not promoted her to a GS-12 even absent her whistleblowing. The two basis upon which the ID2 rests for this conclusion are that the Agency would have restructured its declassification program anyway; and second, that Petitioner was not doing classification work equivalent to other positions in other libraries. The problem with this conclusion is that the **only** stated reason given by Assistant Director, **the person who made the decision to remove**

Petitioner from her duties and not promote her, was that Petitioner was "sick" and that he and Petitioner's supervisor were concerned about Petitioner's health and the stress of her job on her. The Assistant Director said this was his primary concern for removing the duties and not promoting Petitioner. Only because the Agency's representative made the argument about "reorganization" during hearing before AJ Puglia did this evidence even come before AJ Puglia. That the ID2 ignores the primary reason given by the manager who made the decision to remove Petitioner and not promote her itself should demonstrate the lack of substantial basis for finding that the Agency proved by "clear and convincing evidence" that it would have removed Petitioner's duties and not promoted her.

As for Petitioner not showing she was doing the duties of a GS-12, the Agency never had a desk audit performed before her duties were removed to determine whether her duties, were the same as those at other libraries who had been graded the position a GS-12 or higher. The one person who had access to all the persons doing declassification work at all the libraries as well as "vault duties" was The Information Security Manager for NARA. The Information Security Manager for NARA unequivocally stated that Petitioner was doing the same work. The Information Security Manager for NARA testified that based upon her experience since 1990 in PL as head of security, each PL designated **one** archivist as the source person who had the knowledge, background and history of the documents to do declassification work. She assumed **all** these persons had the same grade level. Nor can it be disputed that persons holding the titles that Petitioner did, were at a higher graded position, in most instances a GS-13 supervisor, like Petitioner's supervisor, or even a GS-14. This the ID2 ignores and rather relies on (as does the Federal Circuit) excerpted testimony from a PL Classification Specialist taken out of context.

PL Classification Specialist acknowledged he did not have all the information necessary to make the decision because Assistant Director had never provided the requested information to him.

There were severe credibility issues during the Agency's evidence as well, especially during Petitioner's supervisor's testimony[1]. There was no credible evidence to support Petitioner was sick, perceived herself as sick, or that others (outside of the Assistant Director and her supervisor) perceived her as sick. However, this statement by the Assistant Director must be taken in light of the Assistant Director' prior effort in 1986 to cast Petitioner in an "emotionally unstable" light when she was in the process of being promoted after her EEO action against him.

Petitioner testified she had taken no sick leave prior to her meeting with the Assistant Director in December of 1993. The Assistant Director and her supervisor made no inquiry of Petitioner after Petitioner's telephone conversation with

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1. Perhaps the most incredulous testimony affecting the credibility of Assistant Director and Petitioner's supervisor came during the second hearing when Petitioner's supervisor testified that he believed Petitioner had "set him up" and tried to destroy him by setting up an unannounced inspection in 1995 and had in fact destroyed classified documents to do so. On cross examination by Petitioner's representative, the supervisor admitted he had no facts, statements, documents or even rumors to support this statement made in an open courtroom with someone from the public unassociated with the case present.

When the Agency's representative attempted to get the Assistant Director to confirm this bizarre statement of Petitioner's supervisor, the Assistant Director either could not or would not go along with the supervisor's slanderous statements towards Petitioner.

the Assistant Director in December about her health. Petitioner also testified that neither the Assistant Director nor her supervisor ever made any inquiry regarding her health during the remainder of 1994. Likewise, when her duties were temporarily returned to her in May of 1995, no one ever asked Petitioner whether it would be stressful for her or how her health was at that point in time. There is no evidence whatsoever that a "fitness for duty exam" was requested by the Assistant Director or her supervisor, which given Petitioner's security clearance, could have been requested. In May 1994 Petitioner filed a grievance because of her removal from her prior duties and the Assistant Director became aware that she did not wish to be removed from her duties. At the grievance meeting, Petitioner informed the Assistant Director and the others present she was doing "nothing". Apparently, this did not concern TL management as no one assigned Petitioner any work.

Likewise there was absolutely no "clear and convincing evidence" of a so called " reorganization plan" by Petitioner's supervisor as claimed by AJ Puglia and as set forth in ID2. Although the "team approach" to management of "vault" documents was a recognized and utilized concept in the PL system, all the PLs had utilized a GS-12 in some capacity to "head up" the team — there was no evidence that any library had in fact used a GS-13 Supervisory Archivist to head up a "team" as Petitioner's supervisor now intended to do. It can also be argued, that if the Assistant Director was intent on pursuing a GS-12 non supervisory archivist position for Petitioner, and relieving her workload and attendant stress, the "plan" to utilize a "team" would have also included the concept of a "team leader" with Petitioner in that position, backed up by others who could learn from Petitioner. Yet that was not done. Nor was any legitimate attempt made

by the Agency to explain why it was not done or even considered. Rather, the new "team" consisted initially of the other archivist (who was not to work in classified) and another archivist who had no classification experience at all and Petitioner's supervisor, who by his own admission and that of the Assistant Director, had next to no experience at all in the vault and knew only what Petitioner had told him. Petitioner's supervisor admitted that rather than have Petitioner train the new team in the work of the vault, they sat together and read "manuals" including those prepared by Petitioner, without any input from her even though she was the "expert". In fact, Petitioner's supervisor could not recall at the hearing anything he had said to Petitioner about training anyone at all.

This "reorganization" led to an inspection of the TL vault by the Information Security Manager for NARA in May 1995 and her "writing up" TL for numerous security violations. As a result of those criticisms, the Assistant Director had discussions with CO in which he was told to remove Petitioner's supervisor from his position as head of "vault team" and reinstate Petitioner. Petitioner's supervisor also requested that the titles he held as Top Secret Security Control Officer and Assistant Information Security Manager and the responsibilities attendant to those titles be given to Petitioner immediately. Of course Petitioner was not given a GS-12 and the "reorganization" was never enacted thereafter. This record clearly indicates that there was a total lack of "clear and convincing evidence" to support ID2's finding that TL would have removed Petitioner anyway from her job and not promoted her.

REASON FOR GRANTING THE WRIT

ARE A FEDERAL EMPLOYEE'S DUE PROCESS AND PROPERTY RIGHTS IN HER JOB VIOLATED WHEN ADMINISTRATIVE AND APPEAL FORUMS FAIL TO ADHERE TO THE RULES FOR RESOLVING FACTUAL DISPUTES, AND FAIL TO TIMELY RESOLVE THE EMPLOYEE'S EXERCISE OF HER RIGHTS IN THESE FORUMS?

Decisions by an Administrative Judge and the Merit Systems Protection Board are to be reviewed by the Federal Circuit in accordance with the requirements of 5 U.S.C. § 7703(c) (1988) which provides that with regard to "factual findings and conclusions", the Court reviews the Board's decision to determine if there is substantive evidence in the record supporting the factual findings, and to ensure that, in light of that evidence, conclusions of fact and decisions emanating therefrom are not "arbitrary or capricious", an abuse of discretion, or otherwise not in accordance with law; or unsupported by substantial evidence. The Federal Circuit, however, reads this standard to mean that the Board's credibility (and factual) determinations are virtually unreviewable on appeal by presumably the Board as well as the Federal Circuit. *Briley v. National Archives & Records Administration*, 236 F.3d 1373, 1376 (2001). This Briley contends effectively results in a denial of due process when the Board and the Federal Circuit have, as in this case, totally ignored substantial evidence that contradicts the findings by the Administrative forum under the guise that this is best left for the initial trier of fact. Under this standard, as shown by the facts in this case, a federal employee is left to the capricious whims of an administrative judge who chooses, for whatever reason, to ignore large blocks of evidence.

The rules enunciated by the Board and the Federal Circuit in case law have set forth how an Administrative Judge is to resolve factual disputes and issues of credibility. In the case of the Whistleblower Protection Act, consideration of contradictory evidence in the record *is required* in determining whether substantial evidence supports factual findings, as to reasonable belief that employee is disclosing violation of law, rule or regulation that that violation of the WPA has occurred, since substantiality of evidence must take into account whatever in the record fairly detracts from its weight. *Frederick v. Department of Justice*, 73 F.3d 349 (Fed. Cir. 1996). The Board early on determined that the Agency in order to sustain its burden of "clear and convincing evidence" must show "that degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established". *Gergick v. GSA*, 43 M.S.P.R. 651, 662-63 (1990), 5 C.F.R. 1209.4(d). The "clear and convincing" standard **requires** an analysis of credibility, motivation, and bias of witnesses to events. In determining whether the Agency showed, by "clear and convincing evidence", that it would have taken the same personnel action in the absence of the appellant's whistleblowing, the Board has considered the following factors: The strength of the Agency's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the Agency officials who were involved in the decision, and any evidence that the Agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Scott v. Department of Justice*, 69 M.S.P.R. 211, 240, *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table of Cases); *Caddell v. Department of Justice*, 66 M.S.P.R. 347, 351 (1995), *aff'd*, 96 F.3d 1367 (Fed. Cir. 1996); *Jones v. Department of the Interior*, 74 M.S.P.R. 666, 672-673 (1997); *Brewer v. Dept. of the Interior*, 76 M.S.P.R. 363, 370 (1997) citing to *Caddell, supra*.

To resolve credibility issues, an AJ **must** identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such facts as: the witness' opportunity and capacity to observe the event or act in question; the witness' character; any prior inconsistent statement by the witness; a witness' bias, or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. *Craft v. Dept. of Veterans Affairs*, 78 M.S.P.R. 374, 378 (1998). The Board, although it must give deference to the AJ's fact finding **where it is clear the AJ considered the evidence as a whole**, drew **appropriate** inferences and made **reasoned** conclusions on issues of credibility, may make its own determinations of fact when it articulates a sound reason, based on the record, for a contrary evaluation of the evidence. *Craft, Id. See also Rackers v. Department of Justice*, 79 M.S.P.R. 262 (1998).

Finally, the Board **requires** that the Initial Decision identify **all** material issues of fact **and law**, summarize the evidence, resolve issues of credibility, and include the AJ's **conclusions of law and his legal reasoning, as well as authorities on which that reasoning rests.** *Scott, supra* at 221.

Petitioner believes the record clearly demonstrates that the AJ did not engage in this analysis. That when the matter was appealed to the Board, the Board deferred to the AJ's factual findings thereby ignoring rules and regulations regarding factual analysis, and the Federal Circuit did likewise. The rules are clear and if enforced, due process to

preserve a federal employee's property interest in her job exists. However, when the Board and Federal Circuit pay lip service to the standards and the AJ ignores entirely basic standards of resolving factual disputes, not only are due process rights denied the federal employee but the entire legitimacy of the forum is brought into question.

Here too, as the Federal Circuit noted in closing its opinion, almost six years elapsed between the bringing of the complaint to the Office of Special Counsel and the resolution by the Federal Circuit. The second AJ took over two years to rehear the matter and reach a decision which in its 158 pages ignores large portions of the record and is almost devoid of legal citation. Petitioner recognizes that pursuit of rights sometimes is lengthy and protracted, but the great expanse of time engaged in by the second AJ in this case also supports Petitioner's belief that the analysis was flawed by the mere passage of time.

Petitioner quite frankly cannot afford including the 158 page opinion in this brief. Petitioner has therefore resorted to pointing out the factual discrepancies which should call into question whether legitimate standards were applied by the AJ and properly reviewed by the Board and Federal Circuit. Exercise by this Court of its supervisory authority is necessary here to reaffirm to the courts below that short shift should not be given to due process rights affecting the property interests of federal employees in their jobs. If federal employees are not to have a jury trial to resolve their disputes with their federal employer, they should be guaranteed a forum which fairly and by some standard required to be adhered to adjudicates the facts. Otherwise review by a higher court becomes merely a "rubber stamp" which affects the ultimate legal decision which is dependent upon a fair resolution of the facts.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

Petitioner respectfully requests this Court grant certiorari in this case on the question presented as an exercise of this Court's supervisory authority over lower courts to ensure that Petitioner's property interest in her federal employment is accorded due process of law. Petitioner further requests that this case be remanded for a new analysis of her factual claims consistent with the rules of the Board and the Federal Circuit.

Respectfully submitted,

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